1998 WL 34369172 (La.Dist.Ct.) (Trial Motion, Memorandum and Affidavit)
District Court of Louisiana,
19th Judicial District.

In the Matter of The Succession of Lubertha D. BRANTLEY.

Probate Number 62,080.
December 7, 1998.

Defendants Pre-Trial Memorandum

MAY IT PLEASE THE COURT:

This memorandum is respectfully submitted on behalf of defendants, Ruth D. Lloyd, Burnett Dyer, Lillian M. Birkett, Jacqueline D. Phelps, J. M. Dyer, Jean Dyer Patin, Lillian Patricia Potter, Carole Dyer Lewis-Grey, and Erika P. McDaniel (collectively Lloyd). [1]

I. Facts

Lubertha D. Brantley (Brantley) died on December 19, 1994. She was 92 years old at that time. She executed a last will on December 11, 1993 (the Will). Brantley outlived her husband and had no children. She did, however, leave numerous nieces and nephews. These include the parties involved in this matter. Brantley left a large estate. At the time of her death, her probate assets apparently were valued in excess of $400,000.00. See Exhibit A. One of her nieces, Ardelia Clark (Clark), as the alleged sole legatee under Brantleys Will, seeks to recover Brantleys entire estate, to the exclusion of her cousins.

The last few years of Brantleys life had been hard on her. On April 1, 1987, Brantley was fully interdicted pursuant to Civil Code art. 389 (the April 1 Judgment) because she was unable to care for her person and her property. Exhibit B. Clark was appointed as Brantleys curatrix (Curatrix) and Ruth Lloyd was appointed as Brantleys undercuratrix (Undercuratrix).

Clarks tenure as Curatrix had its share of problems. Brantleys other relatives, including Ruth Lloyd, judicially challenged Clarks management and control over Brantleys affairs. A Petition to Remove Clark as curatrix was filed on or about February 1, 1988 alleging malfeasance on Clarks part. Exhibit C.

In an attempt to avoid a judicial review of Clarks actions, a petition was filed on behalf of Brantley to revoke her interdiction on or about May 4, 1988. Exhibit D. The Honorable Robert Downing appointed Dr. Hypolite Landry to conduct an independent mental evaluation of Brantley. Dr. Landry is the coroner for East Baton Rouge Parish. Dr. Landry conducted this examination on May 10, 1988 and will testify that he has been appointed to numerous interdiction proceedings to determine an individuals ability to manage their affairs. In fact, Dr. Landry routinely conducts approximately five to ten commitment examinations per day in his official capacity.

In the instant case, Dr. Landry rendered his letter report to Judge Downing on May 11, 1988. Exhibit E. Dr. Landrys report provides, in part, that Brantley was mentally incapacitated and unable to manage her **finances**. Dr. Landry was concerned about severe errors in judgment and, moreover, opined that others could take advantage of Brantley.

At the time Landry rendered his report he did not believe Brantley had the capacity to understand the nature or extent of her property. Brantley was also unable to rationalize the value of the property. Brantley did not express a desire to manage her affairs and did not have the capacity to manage her **financial** affairs. According to Landry, Brantley would never be able to

manage her affairs. Brantley was also susceptible to influences by others. Moreover, Landry did not believe that Brantley had the capacity, at that time, to execute a Last Will. [2]

On October 28, 1988, Judge Downing signed an order (the October 28 Judgment), revoking the interdiction *subject to* specific limitations related to Brantleys ability to manage and use her assets. Exhibit F. Specifically, the October 28 Judgment declared that the courts action was subject to Brantleys execution of a trust agreement (the Trust). Exhibit G. Pursuant to the Trust, all of Brantleys assets were owned, held, managed, used, and distributed by the designated trustee for her benefit. Trust income was used to provide Brantley with comfortable maintenance, care, and support, and to provide for her general welfare; however, payments made directly to Brantley could not exceed $400.00 per month. This particular provision was consistent with Dr. Landrys observations and conclusions.

The Trust, as adopted by the October 28 Judgment, provided that its terms and. provisions could *not* be revoked or modified without a contradictory hearing. Under this order, the court recognized Brantleys impaired ability to manage her affairs and dispose of her assets, by donation, will, or otherwise. This limitation remained in effect at Brantleys death without modification.

Brantley executed her Will approximately one year before she died and several years after interdiction proceedings ended. She lived alone, but had sitters taking care of her both on weekends and weekdays. Clark lived next door and visited regularly. Clark and others, including witnesses to Brantleys testament, will acknowledge that Brantley placed complete trust in Clark.

Brantleys Will was drafted by David Ferguson (Ferguson), a local Baton Rouge attorney who has a general practice. He could not recall doing any legal work for Brantley on prior occasions. Ferguson believes he may have done some tax related work for Brantley prior to graduating from law school. He previously did legal work for Clark. Ferguson did know of Brantley since they both attended the same church, Evening Star Baptist Church. Clark also attends the Evening Star Baptist Church.

Brantleys Will was witnessed by Doretha Robinson (Robinson), one of Brantleys regular sitters. Robinson was hired by Clark and is also very active in the Evening Star Baptist Church. The other witness was the Rev. Lionel Lee (Lee), the pastor of Evening Star Baptist Church. Lee has known Brantley and Clark for decades and, moreover, is Fergusons uncle. Ferguson has done legal work for both Lee and Evening Star Baptist Church.

Although Clark did not sign as a witness to the Will, she was present on those occasions in which Ferguson met with Brantley, including the occasion on which the Will was executed. Accordingly, the 91-year old former interdict who probably trusted Clark more than anyone else was effectively precluded from discussing estate planning matters privately with Ferguson. Clark made sure that she was always present and was aware of Brantleys actions. As acknowledged by Clark, Brantley expressed a testamentary intent contrary to the terms of her Will after the Will was executed. This later intent was consistent with the initial expressions to Ferguson.

More importantly, the contemplated testimony does no more than support Clarks position that certain formalities may have been blindly and mechanically followed. Such testimony does not bear on Clarks influence, nor the frail mental capacity of Brantley. In fact, the totality of the evidence anticipated at trial supports the conclusion that the stories of the witnesses regarding the facts and circumstances surrounding the Wills execution and Brantleys capacity were contrived by, and for the benefit of, Clark.

II. ***Law and Argument***

a. ***Introduction***

Brantley had to be able to comprehend generally the nature and consequences... of her actions to execute the Will. Civil Code art. 1477: In other words, at common law to be competent to make a will, a person must have a general and approximate understanding of the nature and extent of the assets to be disposed of, and he must know what it means to make a will. Comment

(b); C.C. art. 1477.[3] Since Brantley was not interdicted at the time the Will was executed, a clear and convincing standard applies in this case.

Proof by clear and convincing evidence is a lesser standard than beyond a reasonable doubt. *Succession of Young,* 96-1206 (La. App. 3rd Cir. 3/5/97), 692 So. 2d 1149. Testamentary capacity is a factual question determined by the trier of fact. See *Succession of Sullivan,* 509 So. 2d 844, 848 (La. App. 1st Cir. 1987). It requires a demonstration that the existence of a disputed fact is highly probable, much more probable than its non-existence. See *Succession of Christensen,* 94 0263 (La. App. 1st Cir. 12/22/94), 649 So. 2d 23, *writ denied,* 652 So. 2d 1346. Even more conflicts appear in the testimony, reasonable credibility evaluations and inferences of fact are not manifestly erroneous. *Succession of Anderson,* 26,947 (La. App. 2d Cir. 5/10/95), 656 So. 2d 42. See also *Succession of Young,* 96-1206 (La. App. 3rd Cir. 3/5/97), 692 So. 2d 1149. The ability to read is an element of testamentary capacity to make a statutory will. *Succession of Barranco,* 94-1726 (La. App. 1st Cir. 6/23/95), 657 So. 2d 708. Whether a testator can read is a question of fact. *Succession of Fletcher,* 94-1426 (La. App. 3rd Cir. 4/5/95), 653 So. 2d 119, *writ denied,* 655 So. 2d 338.

Executing the Will was nothing more than a conditioned reflex. Trial testimony will support the conclusion that prior meetings occurred between Brantley, Ferguson, Clark, and the Will witnesses to rehearse executing the Will. Clark will deny participating in any way in the rehearsals or Brantleys alleged decision to leave Clark all of her property. However, the evidence will show that Clark was always present to create an atmosphere of trust and familiarity for Brantley.

Coupled with the earlier preparatory meetings with Brantley, it provided the foundation for an atmosphere in which Clark can allege that all of the required formalities were followed, albeit in an artificial and staged atmosphere. What could be more comforting to an **elderly** senile person than practice the routine and to have her caretaker, Clark, with her at the time a document was executed?

Lee and Robinson may have been unwitting accomplices to Clarks scheme because of the false trust they placed in Clark. Relying on years of friendship, Clark tried to influence her pastor by contributing thousands of dollars of Brantleys money to Evening Star Baptist Church in the months prior to Brantley executing the Will. Likewise, Robinson was employed by Clark, for Brantleys benefit, and was paid with Brantleys money. Lacking from their testimony will be concrete confirmation that Brantley knew what she was doing. Robinsons and Lees testimony will be qualified as to matters that took place with words like assumed and appeared. On the other hand, these same witnesses acknowledge the contrived circumstances, and will support the extent of Clarks influence and the steps taken to indoctrinate Brantley.

b. ***Brantley was susceptible to undue influences.***

The facts and circumstances surrounding the Wills execution support, and are consistent with, a pattern of Clarks scheme of taking advantage of Brantley and using Brantleys assets for improper purposes. This is not the first time Clark has attempted to manipulate Brantley. Judicial proceedings were initiated to remove Clark which culminated in the court appointing experts to examine Brantleys capacity and set a hearing on the matter. A revocable trust for Brantley was created in response to disputes between Clark on the one hand, and Lloyd and Dyer on the other, related to the controlling manner in which Clark had been handling Brantleys affairs as her curator. The trust was designed as a compromise to provide a vehicle for management purposes, but preclude Clerks alleged abuse.

The trust was managed and operated by Baton Rouge Bank & Trust as trustee. The trust specifically provided that payments to the settlor, Brantley, could not exceed $400 per month. Clark was aware of these limitations; however, the evidence at trial, including checks and bank statements, will establish that Clark did not follow these limitations, but abused the trust and existing court order by obtaining and using the funds beyond those parameters fixed by this Court. Unfortunately, Clark was able to circumvent the trust provisions and, at the same time, use her close relationship with Brantley as a means to unduly influence Brantley into executing the Will.

Financial records show deposits by the trustee into a checking account in the amount of $400.00 per month through March 1992. Beginning in and around April 1992 the deposits to Brantleys account consistently increased by approximately $2,000.00 per month. There was also a corresponding increase in the total monetary volume of checks written from Brantleys account. Clark co-signed these checks. For example, the contributions to the Evening Star Baptist Church increased from $3.50 to $50.00 amounts to contributions ranging from $300.00 to $1,500.00. Lee, as pastor of Evening Star Baptist Church, was a witness to Brantleys Will. In any event, these direct distributions were contrary to the October 28 Judgment and the terms of the Trust. They further establish Clarks pattern of control to obtain all of Brantleys assets.

Brantleys Will is null because it was the product of influence by a donee or another person that so impaired the volition of the donor as to substitute the violation of the donee or other person for the volition of the donee or other person for the volition of the donor. La. C.C. art. 1479. Contrary to *Succession of Cole*, 618 So. 2d 554 (La. App. 4th Cir. 1993), the instant case is not a situation in which Clark exercised influence such as giving advice and offering guidance and assistance. See *Succession of Anderson*, 26,947 (La. App. 2d Cir. 5/10/95), 656 So. 2d 42. Clark took action, in part through others, to carry out her scheme for complete control over Brantleys estate.

By ordering the transfer all of Brantleys property to the Trust, this Court insured that another person, the trustee, had both legal title and the *sole* ability to *manage* and *dispose* of Brantleys property for her benefit. The complete transfer of property to the Trust also shielded Brantley from outside influences and insured that someone capable handled her **financial** affairs. Judge Downings actions were consistent with the following concerns of Dr. Landry:
A. [By Dr. Landry] Because shes [Brantley] susceptible to -- I could fool her. I could have fooled her and told her that the numbers didnt mean anything, and I believe she probably would have done anything to -- I would have asked her to.

Q. [By Mr. Rossi] I believe your report also indicates that she was susceptible to influences by others?

A. Well, she could be, yes, sir.

Q. Was her condition such that she could be misled as to the consequences of action that she -- she may have taken?

A. Well, I believe I answered that in my letter, sir. I stated its quite obvious to me that she would make serious errors in judgment and she would be unaware if people attempted to take advantage of her, and I think thats a pretty self-contained statement that covers a lot.

In fact, Dr. Landrys concerns about undue influence are also anticipated in the testimony of Robinson, a witness to the Will. Robinson will testify that the testatrix, lawyer, and two witnesses got together on two occasions related to Brantleys execution of the Will. This was apparently a dry run to rehearse the formal requirements.

c. *Lack of capacity.*

1. Medical testimony shows no capacity.

The medical testimony and the circumstances leading up to and surrounding the Wills execution, that Brantley did not have the requisite capacity. Contrary to self-serving testimony of Clark, and the biased perceptions of other witnesses, Brantleys physicians believed, on a medical basis, that Clark did not have the requisite capacity to execute a will.

As a 92-year old who could not manage her affairs, Brantley did not have the requisite capacity to execute a Will in December 1993. The judicial restrictions imposed on Brantleys ownership and management of her assets recognized Brantleys inability to manage her affairs and understand the nature of any type of disposition.

The standards contained in the trust gave the trustee broad discretion in making distributions to Brantley, but with limited direct payments to Brantley. This concern parallels the observations and opinions of Dr. Landry. As noted by Dr. Landry:
Q. Lets move on to the last full paragraph of your report. What was your bottom-line opinion about her ability to manage her affairs?

A. Oh, as I stated, due to the magnitude of the estate it would be advisable to have a nonfamily member, such as a certified public accountant or a lawyer appointed as the curator or curatrix, and I can even qualify that more, even if it was not a magnitude of such. If she was fully dependent upon a small amount, it would still be advisable to have -- to have had that.

Q. Did you believe she could or could not manage her **financial** affairs?

A. I believe that she could not manage her **financial** affairs.

Q. Did she have the ability, when you saw her, to place any kind of value on the property that she owned?

A. No, sir, she didnt tell me any value.

Q. Was she able to tell you the source of any income that she had?

A. She told me that she -- that she owns various apartments and -- but she was unaware of the rent derived from them.

Q. But nothing else?

A. Thats all. She did not know how much money she had in savings, if any, and whether or not it drew any interest and how much it drew.

Landry Depo. p. 20, lines 11-25; p. 21, lines 1-9.

By February 1992, even Dr. Waguespack agreed with this assessment:
Q [By Mr. Rossi] Do you think that Mrs. Brantley, as of February 1992, had the ability to understand and appreciate the properties and the monies that she might own?

A [By Dr. Waguespack] Thats strictly an opinion, but I would say no.

Q And would you expect her to return to the point where she would have an understanding of the nature and extent of her properties at sometime in the future?

A No, sir. At that time, she was eighty-six, and I just wouldnt think that she would recover.

Waguespack Depo., p. 30.

The testimony of the treating physicians is appropriate to make the factual determination of Brantleys alleged ability and mental capacity to execute a will. For example, in *Succession of Dodson*, 27,969 (La. App. 2d Cir. 2/28/96), 669 So. 2d 642, the decedent, Dodson, executed a statutory will after admission to a nursing home. At that time, Dodson was 87 years old and had deteriorating health. The nursing home social services director claimed that she was in a position to determine if the testator had. the ability to comprehend the, import of the action taken.

In *Dodson*, the only person to testify as to competency at the time the will was executed was the notary public who believed the requisite capacity existed. Great weight was given to the testimony of the treating physicians and the court determined that the testator lacked capacity. Despite nursing notes documenting the testators condition and supporting capacity, at least one treating physician disagreed. Likewise, despite the inconsistent questionable testimony of the witnesses to the Will, Brantleys doctors do not believe she had the capacity to execute a will.

Likewise in *Succession of Reynaud*, 619 So. 2d 628 (La. App. 3rd Cir. 1993), the court concluded that the testimony of several treating physicians that the testator did not have capacity to execute a will meet the clear and convincing standard. While the court applied pre-1993 law, it also concluded that its result with respect to capacity would be the same under either the old or the new law.

Also, in *Succession of Hamiter*, 519 So. 2d 341 (La. App. 2d Cir. 1988), *writ denied*, 521 So. 2d 1170, the court accepted the testimony of a physician who had never even seen the testator over the testimony of two treating physicians and the witnesses to the will in upholding the trial courts finding that the testator lacked capacity. Exhibit H. At issue was whether a sitter who took care of former Supreme Court Justice Hamiter had used her influence and Justice Hamiters weak mental state to encourage him to write a new will leaving a substantial portion of his property to her. Some of Justice Hamiters nieces filed an interdiction proceeding to protect him from the sitter. While this suit was ultimately dropped, the parties agreed that an independent CPA would have to approve all checks over $350.00. This arrangement was remarkably similar to the trust created for Brantley.

Under the law as it existed at the time of the case, proof of undue influence was not relevant for invalidating a will solely on the grounds of such influence unless it was present at the time of the execution of the will. However, the court did hold that Justice Hamiters susceptibility to the undue influence could be used to establish that he lacked the mental capacity to execute a will. The court found that the sitter controlled Justice Hamiters daily life and eventually his estate planning. Based upon Justice Hamiters Weak mental state and susceptibility to the sitters control, the court upheld the finding that Justice Hamiter lacked testamentary capacity.

The sitter claimed that Justice Hamiter had a lucid interval at the time he executed the will. However, the court found that all of the evidence of Justice Hamiters incapacity at all other times was not overcome by the weak testimony of the witnesses as to his capacity. The court, citing *Cormier v. Myers*, 223 La. 259, 65 So.2d 345 (1953), stated that [w]here a testators insanity is shown to be habitual and constant, there arises a presumption of insanity at the moment of the confection of the will. *Hamiter*, at 347. In this case, both treating physicians have stated that they did not think Brantley had the capacity to execute a will. All medical testimony will be contrary to any assertion that Brantley had the requisite capacity when she executed the Will.

2. The Will is contrary to Brantleys intent

Ferguson claims that Brantley advised him, on their initial visit, that she wanted certain nieces and nephews to have all of her property. Although denied by Clark, Ferguson claims Clark was present at all three meetings he had with Brantley. Although Clark denies she ever knew of the contents of the Will, she agreed with Ferguson that Brantley stated at the initial meeting with Ferguson that certain nieces and nephews -- Leo, Rose, and Al -- should have specific property. Clark acknowledged that the specific bequests to others would consist of acreage, Brantleys house, and certain rental property.

Clark tried to distance herself from Brantleys intent as initially expressed to Ferguson. She claims Brantleys wishes were made known several months before the Will was executed, and prior to the time Ferguson became involved. Despite Clarks attempts to distance herself from Brantleys decisions, Ferguson will testify that Brantley changed her mind after his initial visit with Brantley at which Clark was present. Not surprisingly, instead of specific bequests to certain relatives, Brantley allegedly changed her position and told Ferguson she wanted Clark to have all of her property. What influenced Brantley, an **elderly** invalid, to change her mind? Apparently, it was Brantleys misplaced trust, coupled with the action and conduct of Clark.

Despite Clarks assertions that she did not influences Brantleys decision, she will admit that after the Will was executed, Brantley continued to express her intent that Clarks daughter get her house at death. Clark will acknowledge that Brantley trusted her to carry out her real desires and distribute her property in a manner inconsistent with the Wills only bequest. Surprisingly, Clark will acknowledge that if she obtains the bequests in the Will, she will give Brantleys house to her daughter to fulfill Brantleys real intent. Accordingly, Clark herself will admit that the terms and contents of the Will are not consistent with Brantleys true intentions.

III. *Conclusion*

Brantley could not manage or dispose of her property. She lacked the requisite capacity. Likewise, she was unduly influenced by Clark. Accordingly, the Will should be annulled and Brantleys estate should be distributed on an intestate basis.

Footnotes

1 The procedural capacity of the parties in the captioned matter as plaintiffs, defendants, and parties in reconvention is somewhat misleading. The captioned matter involves a Will contest that was initiated by movers herein. Ardelia Clarks status is more likened to that of a defendant. However, since Ardelia Clark filed the Petition for Declaratory Judgment, she now maintains the status of plaintiff.

2 Lloyd expects Clark to rely on Dr. Hubert Waguespacks May 2, 1988 letter report. Dr. Landrys examination took place subsequent to Dr. Waguespacks and Dr. Landry considered Dr. Waguespacks opinions. Moreover, Dr. Waguespack has testified that Brantley was incapacitated before the Will was executed.

Q [By Mr. Rossi] Do you know whether or not she - let me ask you this: As of February of 1992, do you think that Mrs. Brantley had the ability to manager her **financial** affairs?

A [By Dr. Waguespack] From then on, I would say no.

Q More probably than not?

A Thats right. Because if I couldnt even do a medical history from her - I couldnt even do a mental status as far as thats concerned.

Wagucspack Depo. pp. 29-30.

3 Comments to 1477(f) also state that if illness has impaired the donors mind and rendered him unable to understand, then that evidentiary fact will establish that he does not have donative capacity.

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